BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN L. HOWARD	)	
Claimant	)	
	)	
VS.	)	
	)	
SAROYA LLC	)	
Respondent	)	Docket No. 1,039,728
	)	
AND	)	
	)	
DEPOSITORS INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the July 1, 2008[1] preliminary hearing Order entered by Administrative Law Judge John D. Clark (ALJ).

ISSUES

The ALJ concluded that while claimant was injured out of and the course of his employment with the respondent on October 20, 2007, claimant failed to establish that respondent's payroll was sufficient to trigger coverage under the Act.

The claimant requests review of this decision but has not filed any brief. Presumably, claimant would argue that the evidence supports the conclusion that respondent's payroll met the statutory threshold such that the Act applies to this accident. Claimant might well also argue that respondent's explicit intention to provide workers compensation coverage to *all* its employees, is a sufficient basis upon which to base coverage.

[1] A Nunc Pro Tunc Order was filed on July 2, 2008 to correct the incorrect docket number listed on the previous order.

Respondent (both through its separate counsel and the counsel provided by its insurer) argues that the ALJ should be affirmed in all respects. Respondent's actual payroll in 2007 and the expected payroll in 2008 falls short of the $20,000 threshold. These figures expressly exclude any payments made to the family members who participate in the operation of the respondent and its business. Thus, the argument goes, the Act has no application to claimant's injury.

Respondent and its carrier also argue that there is no coverage for claimant's October 20, 2007 accident as the insurance coverage did not become effective until October 25, 2007. However, this issue was not addressed by the ALJ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Both parties agree claimant sustained a work-related injury on October 20, 2007 when he fell from a ladder. He sought immediate treatment from an emergency room, complaining of pain in his left shoulder. But claimant has alleged a series of accidents thereafter, as he continued to work and received no further treatment. His present complaints are to his left shoulder, back and left leg. Respondent had no workers compensation insurance as of October 20, 2007, but coverage was secured effective October 25, 2007. Respondent's representative testified that it was his intention to have coverage for all of the company's employees, including the family owners/workers.

The difficulty in this case is the fact that respondent, a newly formed limited liability company, was formed apparently for the sole purpose of purchasing this business that had formerly employed claimant since 2000. Thus, there is very little payroll information available for purposes of determining the application of the Act. Before his injury and while working for his former employer claimant was working 40-50 hours per week and was paid $8 per hour. There were two other employees who both earned $6 an hour and worked full-time.

And while claimant continued to work at his same duties after the transfer took place in October 2007, it was for another employer, the respondent identified above, who had no workers compensation coverage (at least until October 25, 2007). And after the transfer and for the 3 remaining months in 2007, respondent's payroll was approximately $5,200. In 2008, respondent began eliminating outside employees for various reasons and employed mostly family members. Thus, in 2008, the actual *and the projected* payroll (to non-family members) was less than $20,000. The record contains no information that sheds any light on what, if anything, any of the family members were earning. All that is known is that non-family members were paid a sum that falls short of the $20,000 threshold both in 2007 and 2008.

The ALJ concluded that:

> 1. This [c]ourt finds that the [c]laimant was injured out of and in the course of his employment with the [r]espondent on October 20, 2007.
>
> 2. The [r]espondent began in [sic] business on October 18, 2007. The payroll for the [r]espondent in 2007, was $5,258.10. The [r]espondent did not exist in the year 2006.
>
> 3. The [r]espondent does not have a payroll sufficient to require them to be covered by the Kansas Workers Compensation Act.[2]

Thus, benefits were denied.[3] And now claimant appeals.

It is claimant's burden to prove coverage under the Act and that burden necessarily includes the obligation to establish whether respondent has the requisite payroll requirements as set forth in the Act.[4] K.S.A. 44-505(a)(2) exempts from application of the Kansas Workers Compensation Act the following:

> (2) any employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, **except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection**; (Emphasis added)

In order to avoid being subject to the provisions of the Kansas Workers Compensation Act, the above statute establishes a two-prong test. First, the employer must not have had an annual payroll for the preceding calendar year greater than $20,000. Secondly, the employer must reasonably estimate that it will not have a gross annual payroll for the current calendar year of more than $20,000 for all employees excluding family members.[5]

Here, the uncontroverted evidence was that respondent was a newly formed entity that purchased an ongoing business. It had no payroll or existence whatsoever in 2006.

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[2] ALJ Order Nunc Pro Tunc (July 2, 2008).

[3] *Id.*

[4] *Brooks v. Lochner Builders, Inc.*, 5 Kan. App. 2d 152, 613 P.2d 389 (1980).

[5] *Fetzer v. Boling*, 19 Kan App. 2d 264, 867 P.2d 1067 (1994).

Respondent's payroll commenced in October 2007, and for that calendar year it paid approximately $5,200 in wages. Obviously that does not breach the statutory threshold.

Then, in 2008, the only evidence put forth shows that the payroll in the first two quarters of 2008, did not exceed the $20,000 threshold when the family member's wages are excluded. And based on the evidence, this was intended to be a family-run business with only minimal, part-time help from one other employee. Respondent intended on dismissing the outside employees and eventually did so although the circumstances of claimant's termination are not entirely clear.[6] Claimant worked until January 26, 2008, when the employment relationship was severed. So too was that of one of his co-workers, Patricia, who was also his sister. The third co-worker had already quit by this time. That left only family members working at respondent's business.

No one acknowledged the regulation that applies to this instant set of facts. K.A.R. 51-11-6 provides that "[t]he provisions in K.S.A. 44-505 excluding the payroll of workers who are members of the employers family shall not apply to corporate employers".

Respondent is a limited liability *company*, a corporation, formed for the purpose operating this business. It is not an individual or a partnership. Thus, the amount of monies paid to family members is crucial to determining whether there is jurisdiction under K.S.A. 44-505. Those monies are, pursuant to K.A.R. 51-11-6, to be **included** in determining the respondent's payroll.

This Board Member finds that there is insufficient information within this record to find that respondent's payroll exceeded the $20,000 requirement. It may be that the wages of family members which were excluded from the record would increase the respondent's payroll to a point that coverage under the Act would be triggered. But based on this record, there is no way of making that determination. Thus, the ALJ's Order is affirmed.

Finally, although respondent and its carrier argue that there is no coverage for any accident that occurred on October 20, 2007, the ALJ made no finding as to coverage. Thus, the Board will not address this argument.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[7] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

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[6] At one point, claimant testified that he quit working for respondent because respondent had accused his sister, also an employee, of stealing . But at another point he testified that he was fired for challenging the circumstances of his sister's firing.

[7] K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated July 1, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2008.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Norman Manley, Attorney for Respondent
John D. Clark, Administrative Law Judge